UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 27

CHARLES SCHWAB & CO., INC.

And Case No. 27-CA-184730

MICHELLE HUSTON, an Individual

COUNSEL FOR CHARLES SCHWAB & CO., INC. SUPPLEMENTAL BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Submitted by
David Zwisler, Esq.
Ogletree, Deakins, Nash,
Smoak, & Stewart, P.C.
Wells Fargo Building
1700 Lincoln Street, Suite 4650
Denver, CO 80203
Telephone: 303.764.6800
Fax: 303.830.7989

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

RESPONDENT'S SUPPLEMENTAL BRIEF

Charles Schwab & Co., Inc. ("Schwab," the "Company," or "Respondent"), by its attorneys Ogletree, Deakins, Nash, Smoak & Stewart, P.C., and pursuant to the Administrative Law Judge's June 14, 2017 Order entitled, "Invitation to File Supplemental Briefs," hereby files this Supplemental Brief as follows:

I. INTRODUCTION AND OVERVIEW

The Administrative Law Judge is familiar with the procedural history and facts of this case and Schwab's Post-Hearing Brief is incorporated by reference. In response to the Judge's Order inviting supplementation, Schwab now provides additional law and argument supporting its position that the two policy provisions at issue[1] do not violate the National Labor Relations Act ("NLRA" or the "Act") because neither provision, when read and applied in the proper context, could *reasonably* be construed to chill protected activity or are necessary for compliance with other regulatory obligations.

The first provision—prohibiting acts of disrespect or unprofessional or rude conduct to or about co-workers or clients—is not facially invalid. Schwab is permitted to expect its employees to work together in an atmosphere of civility, while also treating Schwab's clients with respect. There is nothing in the policy limiting employees' protected activity and, more specifically, nothing in the policy specifically prohibiting employees' conduct as it relates to the Company or to employees' supervisors.

The second provision—prohibiting acts of dishonesty, misrepresentation, or other misleading conduct—is a necessary element of Schwab's obligation to comply with a variety of

---

[1] General Counsel contends the following two prohibitions contained in Schwab's definition of misconduct are overbroad and violate the Act:

- Acts of disrespect or unprofessional or rude conduct, including making disparaging comments to or about co-workers or clients; and
- Acts of . . . misrepresentation, or other misleading conduct.

statutory and regulatory requirements. Numerous regulations governing both the banking and securities industries require that employees not engage in dishonesty, misrepresentation, or misleading conduct of any kind. If employees engage in acts of dishonesty, misrepresentation, or misleading conduct, it is the expectation and requirement of the government's regulating agencies that Schwab hold those employees accountable. Failure to do so subjects the Company to a variety of consequences, including possible revocation of the Company's ability to engage in banking and investment services. As the Administrative Law Judge pointed out, there are several *additional* relevant statutory and regulatory provisions which require Schwab and its employees to refrain from dishonesty, misrepresentation, or other misleading conduct. As invited by the Administrative Law Judge, Schwab will address these additional provisions.

In its June 14, 2017 Brief to the Administrative Law Judge, General Counsel relied on several NLRB decisions that are either irrelevant to this dispute or inapposite to the facts of this case. As invited by the Administrative Law Judge, Schwab will also address General Counsel's arguments and authorities.

II. ARGUMENT

A. Standard.

Schwab and General Counsel agree that because there are no allegations in this case that these rules were promulgated in response to union activity or that the rules have been applied to restrict the exercise of Section 7 rights, the governing standard at issue in this case is the third *Lutheran Heritage* factor: whether Schwab's employees would reasonably construe the language to prohibit Section 7 activity.

As argued and briefed in Schwab's original post-hearing brief, employees would not reasonably construe either of the rules General Counsel now challenges to prohibit Section 7

activity. Neither rule is unlawfully overbroad and neither rule, when read in context, would reasonably be read to chill protected activity. In addition and contrary to the General Counsel's position, the "balancing test" recommended in the *William Beaumont Hospital,* 363 NLRB No. 162 (April 13, 2016) dissent is the exact kind of rationale approved by the Board in *Dresser-Rand,*358 NLRB 254 (2012) for policies implicating other statutorily enumerated obligations.

In this Supplemental Brief, Schwab (1) discusses the additional statutory and regulatory provisions identified by the Administrative Law Judge and (2) addresses authorities General Counsel relied on it is post-hearing brief.

B. The Additional Statutory and Regulatory Provisions Identified by the Administrative Law Judge Further Support Schwab's Position that Schwab is Required to Maintain its Rule Prohibiting Dishonesty, Misrepresentation, and Misleading Conduct.

In addition to the ten statutory and regulatory provisions Schwab introduced during the hearing in this matter that require Schwab to govern its employees in a manner that prohibits dishonesty, misrepresentation, and misleading conduct, the Administrative Law Judge has identified six federal statutes, one federal regulation, and one FINRA Rule also implicating Schwab's obligations related to its employees' dishonesty, misrepresentation, and misleading conduct. Many of the referenced statutes fall within the umbrella of the Securities Act, which is enforced by the United States Securities and Exchange Commission ("SEC"). As Michael Marsh testified at the hearing, FINRA and the SEC regulate all of Schwab's employees, not just individuals who are registered to sell securities. (Tr. at 91:24-92:1.)

The overriding purpose of the "Securities Act is to compel full and fair disclosure of all material facts in the issuance of securities so that investors can be adequately protected and make mature investment decisions based on all relevant data." *Felts v. Nat'l Account Sys. Ass'n, Inc.*, 469 F. Supp. 54, 63 (N.D. Miss. 1978). The additional authorities and requirements to which

Schwab must adhere further emphasize Schwab's employees' general recognition of the industry's requirements and provide the proper lens through which Schwab employees interpret its policies. Schwab is mandated to maintain and enforce its policy prohibiting dishonesty, misrepresentation, and misleading conduct. Schwab will identify the applicability of each of these additional provisions below.

1. 15 U.S.C. § 77(q)(a)

Title 15 makes it a crime for Schwab, through one of its employees, to offer or sell securities using any scheme to defraud or to engage in a "practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77(q)(a). To establish liability under this provision, the SEC must show by a preponderance of the evidence that "in the offer or sale, or in connection with the purchase or sale, of a security, an affirmative misrepresentation was made or there was a failure to disclose material non-public information when there was a duty to do so." *S.E.C. v. Wellshire Sec., Inc.*, 773 F. Supp. 569, 573 (S.D.N.Y. 1991) (emphasis added). The breadth of this statute captures all of the terms included in Schwab's rule: dishonesty, misrepresentation, and misleading conduct. Individuals have been convicted under this provision for selling securities using "untrue statements." *See Maxfield v. United States*, 360 F.2d 97 (10th Cir. 1966) (affirming defendants' conviction for selling stock of insurance company by means of untrue statements and omissions of material facts). Not only can individuals be liable for dishonesty, misrepresentation, or misleading conduct under this provision, but a firm, such as Schwab, can be penalized for the actions of its employees. *See e.g., Vernazza v. S.E.C.*, 327 F.3d 851, 862 (9th Cir.), *amended,* 335 F.3d 1096 (9th Cir. 2003) (firm registered as an investment advisor was suspended as an advisor for six months where several of its partners were found to have made materially false statements.).

As Michael Marsh testified, Schwab is a broker-dealer that "offers investment products and services" including, "stocks, bonds," etc. (Tr. 56:20-23.) The referenced statutory provision applies to Schwab. Schwab must enforce its rule prohibiting dishonesty, misrepresentation, and misleading conduct to limit and discourage activities that may result in individual criminal liability or suspension and to avoid its own liability based on its employees' conduct.

2. 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5

Title 15 and the accompanying regulation also prohibit insider trading and similar deceptive practices. Under these provisions, Schwab and its employees are prohibited from employing "any device, scheme, or artifice to defraud" or any "act, practice, or course of business" which would operate as a "fraud or deceit upon any person." 17 C.F.R. § 240.10b-5. The word "deceit" is an all-inclusive term encapsulating all of the conduct prohibited by Schwab's rule at issue: dishonesty, misrepresentation, and misleading conduct. Notably, federal courts have explained that the term "manipulation" as used "in § 10(b) . . . refers generally to practices . . . that are intended to mislead investors by artificially affecting market activity." *Pin v. Texaco, Inc.*, 793 F.2d 1448, 1451 (5th Cir. 1986) (internal citations omitted). Therefore, the portion of Schwab's rule at issue prohibiting "misleading conduct" is squarely implicated by the "manipulation" verbiage in the SEC's insider trading laws. Schwab can be liable for its employees' deceitful and manipulative practices under the SEC's insider trading laws. *See e.g.*, *In re Parmalat Sec. Litig.*, 474 F. Supp. 2d 547, 550 (S.D.N.Y. 2007); *Alvarado v. Morgan Stanley Dean Witter, Inc.*, 448 F. Supp. 2d 333, 338 (D.P.R. 2006). In order to protect itself and its employees from allegations of insider trading under these provisions, Schwab must maintain and enforce its policy prohibiting dishonesty, misrepresentation, and misleading conduct.

3. 15 U.S.C. § 77k(a)

The Title 15 prohibition related to false registrations statements is relatively limited in its application. As set forth in the statute, when covered employers' employees (such as Schwab employees) are tasked with preparing and maintaining registration statements, these employees are required not to include any "untrue statement of a material fact" or to omit "to state a material fact" in order to ensure the statement is not misleading. 15 U.S.C. §77k. Schwab's policy, including the prohibition against misleading conduct, therefore, is necessary in order for Schwab to ensure the Company is not violating the law regarding false registrations.

4. 15 U.S.C. § 77l(a)

Under this provision of Title 15, any person who "sells a security" using any communication "which includes an untrue statement of a material fact or omits to state a material fact" is liable to the buyer of the security. 15 U.S.C. § 77l(a). A broker can be deemed a seller for purposes of this statutory provision. *First Trust & Savings Bank of Zanesville, Ohio v. Fidelity-Philadelphia Trust Co.*, 214 F.2d 320 (3d Cir. 1954). Therefore, this provision applies to Schwab employees. Moreover, Schwab can be held liable under this provision for the acts of its employees. *See Holloway v. Howerdd*, 536 F.2d 690 (6th Cir. 1976). Selling a security through use of an untrue statement of material fact or by omission of a material fact implicates the terms at issue in this case: dishonesty, misrepresentation, and misleading conduct. Therefore, Schwab's rule at issue is required in order to protect itself from liability and its clients from harm based on the conduct of its employees.

5. 15 U.S.C. § 78o(b)(4)

Section 78o of Title 15 generally governs the registration of securities brokers and dealers. As Schwab is a broker-dealer, this provision applies to Schwab and its employees. Under this provision, the SEC has the authority to take several actions against Schwab and its

employees, including censure, suspension, or registration revocation if "any person associated with such broker or dealer" included in an application for registration a "false or misleading" statement. 15 U.S.C. §78o(b)(4) (emphasis added). In the context of this provision, a court held that proof of "intent to defraud" or deceive was irrelevant and not necessary for the SEC to suspend a dealer's registration. *Hanly v. Sec. & Exch. Comm'n*, 415 F.2d 589, 596–97 (2d Cir. 1969) ("A securities dealer occupies a special relationship to a buyer of securities in that by his position he implicitly represents he has an adequate basis for the opinions he renders.").

Michael Marsh testified generally that the SEC has authority to revoke or suspend the firm's or an employee's registration. (Tr. 57:10-18; 69:3-14.) Further, the "failure of a brokerage firm to reasonably supervise the acts of its employees has been held to be a basis of suspension or revocation of the registration of the broker or dealer." *See e.g., S. E. C. v. Geon Indus., Inc.*, 531 F.2d 39, 53 (2d Cir. 1976); *Armstrong, Jones & Co. v. Sec. & Exch. Comm'n*, 421 F.2d 359 (6th Cir. 1970) (recognizing doctrine of respondeat superior in context of securities laws). Therefore, in order to protect itself against the possibility of losing its registration to conduct business in the securities markets, Schwab must supervise the acts of its employees, including maintaining and enforcing its policy prohibiting dishonesty, misrepresentation, and misleading conduct. Moreover, this statute provides an avenue for Schwab to avoid liability for its employees' untruthful statements:

> (E) . . . no person shall be deemed to have failed reasonably to supervise any other person, if-
>
> (i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and
>
> (ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

15 U.S.C. §78(o)(b)(4)(E). Accordingly, Schwab must maintain and enforce the challenged rule to demonstrate before the SEC that it has established procedures to prevent violations of this statutory provision by its employees. Otherwise, Schwab faces severe penalties for its employees' actions.

6. 12 U.S.C. § 1467a(r)

Title 12 is specific to the Schwab holding company regulatory reporting obligations. Reporting is dependent on thousands of instances of data recording, each of which must be completed in a true and accurate manner so the requisite reporting can be accomplished in a true and accurate manner. Similar to the above-referenced statutory provision, Schwab must protect itself from liability by maintaining and enforcing its policy prohibiting dishonestly, misrepresentation, or misleading conduct. Specifically, Title 12 contains several "tiers" of penalties for failure to provide timely and accurate reports. 12 U.S.C. § 1467a(r). The first tier contains the lowest possible penalty to Schwab—$2,000 per each day during which false or misleading information is not corrected. *Id.* Penalties under this statute increase drastically with each tier. *Id.* For instance, the second tier penalty is "not more than $20,000 per day" and the third tier penalty is "not more than $1,000,000 or 1 percent of total assets" per day for "for each day during which . . . false or misleading information is not corrected." Schwab, therefore, has incentive (1) to ensure its reporting is done with 100% accuracy so it is not penalized under this statute; and (2) to meet the requirements for the first tier penalty structure in the event Schwab is penalized under this statute.

One of the requirements for a first tier penalty is for Schwab to "maintain[] procedures reasonably adapted to avoid any inadvertent and unintentional error and, as a result of such an error . . . submits any false or misleading report or information." *Id.* But if Schwab submits a false or misleading report not based on an inadvertent and unintentional error, the Company is

immediately placed in the second tier of penalties and subjected to $20,000 per day. Finally, if Schwab publishes a report knowing it contains false information; it is moved into the third tier of penalties and subjected to up to $1,000,000 per day.

Schwab's rule—prohibiting dishonesty, misrepresentation, or misleading conduct—again protects Schwab from severe penalties that, in the case of a $1,000,000 per day penalty, could be devastating to the Company.

7. FINRA Rule 2210

Securities broker-dealers, like Schwab, must comply with FINRA Rule 2210 when communicating with the public, including communications with retail and institutional investors. FINRA Rule 2210. The Rule's general content standards broadly apply to advertising and marketing communications and are meant to ensure communications are fair and balanced and provide a sound basis for evaluating the facts in regard to any particular security, industry or service, including prohibitions on omitting material facts whose absence would make the communication misleading. FINRA Rule 2210(d)(1)(a). Communications to investors regarding registered securities, exempt securities, or non-securities are subject to the Rule's requirements. *Id.* Under the Rule, Schwab and its employees are prohibited from making any "false, exaggerated, unwarranted, promissory or misleading statement or claim in any communication." *Id.* (emphasis added). Further, under Rule 2210, Schwab's employees are prohibited from communications the employee knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading. *Id.*

Recent disciplinary actions show that FINRA is serious about enforcing Rule 2210. For example, FINRA disciplined a Salt Lake City-based firm for several radio show, book, website, Facebook page and billboard advertising and communications violations. (CRD #10684, Salt Lake City, Utah). Among other things, all of the radio shows "contained exaggerated,

misleading, promissory and/or unwarranted statements and failed to provide any discussion of the associated risks, limitations or costs of the products or strategies discussed." (emphasis added).

In its Regulatory Notice 13-45, FINRA addressed its content standards in the context of a broker-dealer's marketing of IRAs and related services. Applying Rule 2210 to these activities, FINRA noted that, whether it be in written sales material or an oral marketing campaign, it would be false and misleading to imply that a retiree's only choice, or only sound choice, is to roll over plan assets to an IRA sponsored by the broker-dealer. FINRA further noted that the marketing of IRA rollover services must be balanced by a discussion of other available options and how they compare to the IRA offered, particularly with regard to fees.

As with the statutory and regulatory provisions described above and those referenced in Schwab's original post-hearing brief, Schwab must enforce and maintain its rule prohibiting dishonesty, misrepresentation, and misleading conduct to comply with FINRA's Rule 2210. Schwab employees understand the requirements of the industry and would not *reasonably* interpret those Schwab policies intended to maintain statutory and regulatory compliance as intending to chill protected activity.

8. These Statutory and Regulatory Provisions Require Schwab's Rule Prohibiting Dishonesty, Misrepresentation, and Misleading Conduct.

Given the broad spectrum of statutes and regulations governing Schwab's industry, Schwab's rule prohibiting dishonesty, misrepresentation, and misleading conduct is particularly fitting for an employer in Schwab's industry, is not unlawfully overbroad, and cannot reasonably read to chill protected activity. Rather, the rule is required for Schwab to protect its interests and the interests of the public. The additional statutory and regulatory provisions for which the Administrative Law Judge permitted supplemental briefing—in addition to the several statutes

and regulations cited in Schwab's original post-hearing brief—demonstrate the breadth of the laws implicating dishonesty, misrepresentation, and misleading conduct of which Schwab must comply and ensure its employees comply.

General Counsel argues Schwab should narrowly create a separate work rule specifically related to each of the cited statutes and regulations. This proposal fails to recognize the dozens of statutes and regulations governing Schwab and its employees' conduct and each statute's or regulation's use of nuanced language in a nuanced context. Unless Schwab prepared a policy that listed every synonym for the word "lie" or "false", the Company could not accurately inform its employees regarding their honesty obligations in the context of this industry. Requesting a specific and separate work rule to comply with each of these various provisions is impractical and inconsistent with the intent of the NLRA and the rulings of the Board. Employees have the ability and capability to interpret the language and understand its meaning in the context of the industry in which they work.

The statutes and regulations governing Schwab and its employees' conduct contain several different terms to reference dishonest behavior. For example, such terms include, but are not limited to: fraudulent, untrue statement, omission of material fact, misleading, manipulative device, deceptive device, deceit, false statement, failure to provide accurate reports, exaggerated, and promissory. The SEC, therefore, governs dishonest behavior with a breadth of varying terms meaning the same thing.[2] Given the variety of ways dishonest behavior is referenced, Schwab needs to use non-specific terms in the work rule at issue to ensure the Company and its

---

[2] General Counsel's attempt to nuance its own Complaint is evidence of the impractical nature of attempting to distinguish between "dishonesty" and "misrepresentations" and "misleading conduct." Merriam-Webster defines "dishonest" to mean "characterized by lack of truth, honesty, or trustworthiness: unfair, deceptive" Merriam-Webster defines "mislead" to mean, "to lead in a wrong direction or into a mistaken action or belief often by deliberate deceit; to lead astray : give a wrong impression". Finally, Merriam-Webster defines "misrepresent" to mean "to give a false or misleading representation of usually with an intent to deceive or be unfair. *misrepresented* the facts". Any attempt to differentiate between the terms belies any reasonable definition of the associated terms. If a prohibition on dishonesty is permissible to the General Counsel, a prohibition on misrepresentations or misleading conduct must also be permissible.

employees are in compliance with federal law. As in *Dresser-Rand*, therefore, Schwab's work rule prohibiting dishonesty, misrepresentation, and misleading conduct is "designed to protect [Schwab] from liability under the securities laws and regulations" and ultimately to protect its clients and the general public from wrong-doing and does not violate the NLRA. *Dresser-Rand* at 284.

C. The NLRB Decisions General Counsel Cites Do Not Support General Counsel's Allegations.

General Counsel relies on several NLRB decisions that are easily distinguished from the facts of this case. When contrasted with Schwab's rules at issue in this case, coupled with the authority cited in Schwab's original post-hearing brief, these decisions do not support General Counsel's contention that the two policy provisions at issue are unlawfully overbroad.

1. Schwab's Rule Prohibiting "Acts of Disrespect or Unprofessional or Rude Conduct Including Making Disparaging Remarks to or about Co-workers or Clients" Is Not Unlawfully Overbroad.

The work rules contained in the decisions General Counsel cites in support of its position that Schwab's "unprofessional or rude conduct" policy violates the Act are factually distinct from Schwab's policy in this case. For example, in *University Medical Center*, the Board found the policy unlawful where it prohibited disrespectful conduct towards not only enumerated individuals (i.e. "service integrators"), but also toward all other individuals. 335 NLRB 1318, 1321. Such a broad rule against disrespectful conduct toward any individual, whether management or not, was "likely to chill employees in the exercise of their Section 7 rights. . . ." *Id.* at 1322. Indeed, the Board focused on the fact that the rule in question broadly prohibited disrespectful "conduct towards others" without limiting the prohibited conduct toward co-workers or clients as in Schwab's rule. *Id.*

General Counsel also cites *University Medical Center* arguing employees may believe their active Section 7 participation may be prohibited by the rule against "insubordination or other disrespectful conduct." Schwab's challenged provision is different and substantially narrower than the *University Medical Center* rule. First, Schwab's rule explicitly references co-workers and clients as opposed to the rule in *University Medical Center* prohibiting disrespect toward all individuals. As discussed in Schwab's original post-hearing brief, Schwab's rule is more in line with the rule upheld in *Copper River of Boiling Springs, LLC*, 360 NLRB 459 (2014). The *Copper* rule was limited to disrespect toward fellow employees or guests, similar to Schwab's rule against disrespect to or about co-workers or clients. *Id.* The rule at issue in the *University Medical Center* decision also included a prohibition against insubordination, which is an explicit reference to respecting managerial authority. Again, Schwab's rule is devoid of any reference to insubordination or disrespect toward management.

General Counsel further cites *Chipotle Services, LLC* out of context. 364 NLRB No. 72 (2016). The *Chipotle* decision did not analyze a rule similar to Schwab's challenged provisions. To the contrary, the rule in *Chipotle* was included within the context of a broad Social Media Code of Conduct policy. The employer maintained a rule prohibiting employees from making "disparaging, false, misleading, harassing or discriminatory statements about or relating to Chipotle, our employees, suppliers, customers, competition, or investors." *Id.* Certainly a rule prohibiting disparaging comments about the company differs from Schwab's rule prohibiting disrespectful or rude conduct to or about co-workers and clients. The former could arguably lead to an employee reasonably believing he or she cannot participate in concerted activity under Section 7, discussing working conditions, while the latter could not reasonably be read to have similar limitations. Schwab's rule is narrowly tailored to meet the Company's business need of

maintaining a satisfactory attitude toward employees and clients. *See Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999).

General Counsel contends the "Board has consistently found that rules prohibiting negative comments about management and coworkers" are unlawful. General Counsel Brief, page 13. General Counsel then cites two cases to support its proposition. The decision in *Hills and Dales General Hospital*, however, included a prohibition against "negative comments" about team members, "including coworkers and managers." 360 NLRB 611 (2014) (emphasis added). Similarly, in *Claremont Resort & Spa*, the Board analyzed a rule prohibiting "negative conversations about associates or managers." 344 NLRB 832 (2005) (emphasis added). In stark contrast, Schwab's rule does not prohibit negative comments about management. The rule is limited to "making disparaging comments to or about co-workers and clients." Nothing in Schwab's rule would lead Schwab's employees to reasonably believe they are prohibited from discussing Schwab, its management, or from soliciting employees to engage in union activity.

General Counsel also states Schwab "did not raise a business justification defense to this rule at hearing." General Counsel Brief, page 14. Schwab's counsel clearly stated in opening remarks that "Schwab is permitted to expect its employees to work together in an atmosphere of civility." See also GC Ex. 1(l) Schwab's Eighth and Tenth Affirmative Defenses.

The authority cited by General Counsel does not support General Counsel's position that Schwab's rude and unprofessional conduct provision—which is limited to conduct toward co-workers and clients—could reasonably be read, in context, to restrict Section 7 activities. The Charge related to this provision must be dismissed.

2. Schwab's Rule Prohibiting Dishonesty, Misrepresentation, and Misleading Conduct Is Not Unlawfully Overbroad.

General Counsel cites several decisions in an attempt to support the proposition that only a policy limiting "maliciously false statements" is permissible under the Act; none of these cases accounts for the unique context of Schwab's rule and Schwab's industry. In *Casino San Pablo*, for example, a rule prohibiting simply false and fraudulent statements to or about another employee, a guest, or the company were found to be unlawful. 361 NLRB No. 148 (2014). Similarly, in *Beverly Health and Rehabilitation Services*, the rule prohibiting "false or misleading work-related statements concerning the company, facility, or fellow associates" was determined to be unlawful. 332 NLRB 347, 348 (2000). These cases miss the mark and do not address the key issue in this case.

As thoroughly described in Schwab's post-hearing brief, the Board in *Dresser-Rand Co. & Local 313, IUE-CWA, AFL-CIO*, affirmed the ALJ's holding that a publicly traded employer's rules related to insider trading and fair disclosure did not violate the Act, in part, because the rules were required due to the regulation of the securities market. 358 NLRB 254 (2012). The ALJ held and Board adopted, "[b]ecause the policies ha[d] very significant implications relating to the Federal securities laws and regulations, [he was required to] consider the Board's standards for resolution of potential conflicts between the Act and other Federal legislation." *Id.* at 280. Schwab's case is different from the cases cited by General Counsel because, as in the *Dresser-Rand* case, Schwab's policy provision at issue protects the interests of the "millions of citizens who invest in publicly-traded stocks and the national interests in the . . . fairness of the markets that deal in those stocks." *Id.* Further, as in *Dresser-Rand*—and supported by the authority described during the hearing on this matter, in Schwab's original post-hearing brief, and described above in this brief—Schwab's policies "designed to protect [Schwab] from liability under the securities laws and regulations" do not violate the NLRA. *Id.* at 284.

General Counsel relies on *William Beaumont Hospital*, which is also inapposite. 363 NLRB No. 162. The *William Beaumont* decision did not include any allegations that the policies at issue were mandated by regulation. *Id.* Further, General Counsel fails to point out that many of the policies upheld as lawful in the *William Beaumont* decision are similar to the policies at issue in this case. For example, the Board upheld the ALJ decision that the hospital's rule prohibiting "[b]ehavior that is rude, condescending or otherwise socially unacceptable" was lawful. *Id.* Further, the Board upheld the portion of that same rule prohibiting "intentional misrepresentation of information." *Id.* The rules the Board found unlawful included a rule related to working conditions which prohibited negative comments "about the moral character or professional capabilities of an employee or physician." *Id.*[3] Further, the *William Beaumont* decision is illustrative because the decision upheld a rule that was specific to the context of a hospital: prohibiting behavior "that is disruptive to a . . . healing environment." *Id.* The *William Beaumont* decision does not overturn the pivotal holding in *Dresser-Rand*: policies "designed to protect [Schwab] from liability under the securities laws and regulations" do not violate the NLRA. *Dresser-Rand* at 284.

As described during the hearing in this matter, in Schwab's original post-hearing brief, and in this supplemental brief, Schwab's work rule related to dishonesty, misrepresentation, and misleading conduct is required of Schwab by countless statutory and regulatory provisions. Schwab and its employees face potential severe penalties for dishonest conduct, misrepresentation, and misleading conduct. General Counsel's reliance on several decisions outside of the context of the highly-regulated securities industry does nothing to counter

[3] The Respondent posits that the reference to "physician" was equated to a reference to management or the company.

Schwab's need for the particular rule in order to comply with banking and securities regulations or the context in which Schwab employees would understand their application.

III. CONCLUSION

In light of the facts and authority cited above, in addition to Schwab's Post-Hearing Brief submitted on June 13, 2017, Schwab requests that the Board find in its favor and dismiss the Charge in its entirety.

Dated this 21st day of June, 2017

s/ David L. Zwisler
David L. Zwisler
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1700 Lincoln Street, Ste 4650
Denver, CO 80203
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 2017, a true and correct copy of the foregoing **CHARLES SCHWAB & CO., INC.'S SUPPLEMENTAL BRIEF TO THE ADMINISTRATIVE LAW JUDGE** was electronically filed through the National Labor Relations Board's website and a copy was served via Federal Express, on the following:

The Honorable Judge Jeffrey Wedekind
(NLRB Website & Federal Express)

Michelle Huston
11970 S. Saunter Lane
Parker, CO 80138-8871
Email: michellehuston3@gmail.com
(Federal Express & E-mail)

Angie Berens, Esq.
NLRB-Region 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294
Email: Angie.Berens@nlrb.gov
(Federal Express & E-mail)

s/ Kimberly Curtis
Kim Curtis, Paralegal